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Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

A. V. BAMFORD,
Petitioner,

vs.

FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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A. V. Bamford hereby petitions for writ of certiorari to review the judgment of the United States Court of Appeals in the District of Columbia in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. The slip opinion is Case No. 75-1309 (App. A, *infra*, pp. 1a-20a). The opinion of the FCC Administrative Law Judge, proposing to grant Bamford's application, is reported at 48 FCC 2nd 1161 (1974). (App. B, *infra*, pp. 21a-37a). The Decision of the FCC Review Board, reversing the Initial Decision and denying the application, is reported at 48 FCC 2nd 1155 (1974). (App. C, *infra*, pp. 38a-49a). The Federal Communications Commission upheld the Decision of the Review Board by Order, dated February 26, 1975; it issued no opinion.

JURISDICTION

The judgement of the Court of Appeals was entered on March 29, 1976. A Petition for Re-Hearing was denied on May 6, 1976, with Judges Tamm, MacKinnon and Van Pelt dissenting. (App. D, *infra*, p. 50a). On May 12, 1976, Petitioner filed a Motion for Stay of Mandate Pending Application for Writ of Certiorari, which application was granted by the Court of Appeals on May 24, 1976. The jurisdiction of this Court is invoked under 47 U.S.C. 402(j) and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where the Federal Communications Commission published a lengthy and complicated "Primer" setting forth standards for conducting surveys of community needs, did the Commission err in denying Petitioner's application for a construction permit because of alleged inadequacies, where Petitioner's survey substantially complied with the requirements set forth in the Commission's "Primer", and

the alleged inadequacies pertained to "requirements" nowhere specified or mentioned in the "Primer", as to which Petitioner had no prior notice?

2. Where, in the course of proceeding before the Commission, the Commission's Broadcast Bureau attacked a survey made by the Petitioner and alleged that the survey was inadequate, and where the Petitioner then made another survey specifically tailored to meet the objections, did the Commission err in refusing to receive the latter survey in evidence?

STATUTES INVOLVED

Section 307(a) of the Communications Act of 1934, 48 Stat. 1083, as amended, 47 U.S.C. 307(a), provides:

The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

Section 309(a) of the Act, 48 Stat. 1085, as amended, 47 U.S.C. 309(a), provides:

Considerations in granting application.

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Com-

mission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

STATEMENT OF THE CASE

A. V. Bamford filed an application with the Federal Communications Commission for a construction permit for a new FM Broadcast Station at Corpus Christi, Texas. On November 18, 1970, the application was designated for hearing. The hearing issues included the following:

"To determine the efforts made by A.V. Bamford to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests."

On March 26, 1970, the FCC had issued an Order, freezing all hearing proceedings, pending revisions in the Commission's standards for the ascertainment of community needs. See "Interim Procedures Relating to Submission of Community Survey Showings . . .", (FCC 70-312, released March 20, 1970, 22 FCC 2d 421, 18 RR 1923). On February 23, 1971, the Commission adopted a "Primer on the Ascertainment of Community Problems by Broadcast Applicants", purporting to set up standards for the making of surveys to ascertain community needs. The Primer itself consists of 36 questions and answers, purporting to furnish all of the information required by an applicant to satisfy the Commission's survey requirements.

On May 12 and 13, 1971, Bamford went to Corpus Christi and interviewed 45 persons, of which he considered

22 to be community leaders and the remainder members of the General Public. Later, on October 19 and 20, 1971, Bamford interviewed 22 additional leaders. A program proposal was devised to meet the needs reflected by the interviews and was introduced in evidence. Subsequently, however, Bamford was called to the witness stand and cross-examined by counsel for the FCC's Broadcast Bureau, who expressed dissatisfaction with certain aspects of the survey.¹ Thereafter, at a prehearing conference held September 17, 1973, counsel for the Broadcast Bureau asked counsel for Bamford whether Bamford was going to further amend his application to reflect further community survey efforts. Counsel was not able to state positively at that time whether or not such an amendment would be filed. However, counsel took the matter up with Bamford, who indicated a desire to make another and additional survey, tailored specifically to meet the Bureau's objections. This was done and, on November 10, 1973, Bamford filed a Petition to amend his application to reflect the new survey results. Administrative Law Judge Denniston denied Bamford's Petition by Order released December 4, 1973. None-the-less, on February 15, 1974, Judge Denniston released an Initial Decision, proposing to grant Petitioner's application, and pronouncing minimal satisfaction with Bamford's survey efforts, except for some reservations concerning the adequacy of Bamford's survey of the secondary service area (areas outside of the city of Corpus Christi).

Exceptions to the Initial Decision were filed by the Commission's Broadcast Bureau and, on October 7, 1974,

¹ *Inter alia*, failure to interview welfare recipients.

the Commission's Review Board issued a Decision (FCC 74R-374), reversing the Administrative Law Judge. The Board, ironically, pronounced itself expressly satisfied with the survey of the secondary service area, but pointed to other alleged inadequacies as the basis for denying Appellant's application.

Question 10 of the "Primer" sets forth nine categories of community leaders required to be interviewed: government, education, religion, agriculture, business, labor, the professions, racial and/or ethnic groups and eleemosynary organizations. Unlike other hapless applicants who had been disqualified for failure to interview required categories, e.g. the applicant in *Voice of Dixie, Inc.*, 29 Pike & Fisher R.R. 2nd 1127 (1974), who failed to interview a labor leader, Bamford had interviewed leaders in all of the nine categories. Nonetheless, the Review Board "thought up" a new category: "welfare recipients," and disqualified Bamford for failure to interview such persons (even though Bamford *had interviewed* welfare recipients as a part of the survey which the Administrative Law Judge had refused to receive into evidence on December 4, 1973).

Moreover, although Bamford — himself, a Spanish-speaking American of Latin descent — had interviewed four prominent Spanish-Americans, including a judge, a city councilman, the pastor of a Mexican-American church, and a county clerk and president of the Knights of Columbus, the Review Board held that Bamford had failed to interview any leaders of the Spanish-American community. The Board took the position that prominent Spanish-American leaders were not leaders of the Spanish-American community unless they were officials of organizations devoted specifically to Hispanic affairs.

Bamford filed an Application for Review of the Board's decision with the Commission, but the Commission refused review in a brief Order, released February 26, 1975, giving no reasons for such refusal. Bamford then appealed to the United States Court of Appeals for the District of Columbia Circuit. While Bamford's appeal was pending, the Commission itself recognized the need for refinement and codification of the "Primer" requirements for community leader surveys. It adopted a rulemaking, establishing a list of 19 categories, required to be interviewed in such surveys by applicants for renewal of license. (See Notice of Inquiry and Proposed Rulemaking, 40 F.R. 22092, at p. 22104. See also the Commission's newly adopted instructions for renewal applicants published at 41 F.R. 19536, p. 19553 (1976). Significantly, the list of the 19 categories adopted by the Commission did not specifically mention welfare recipients. Furthermore, although certain categories in this list specified that leaders in those categories had to be officials of organizations specifically devoted to such categories, no such restriction was placed on the ethnic category.²

A three-judge panel of the United States Court of Appeals for the District of Columbia Circuit denied Bamford's appeal by a vote of 2-1. Bamford requested re-hearing and the same

² The 19 categories, reproduced in 41 F.R. 19553 are as follows: agriculture; business; charities; civic, neighborhood and fraternal organizations; consumer services; culture; education; environment; government; labor; military; minority and ethnic groups; organizations of and for the elderly; organizations of and for women; organizations of and for youth and students; professions; public safety, health and welfare; recreation; and religion.

three-judge panel again decided 2-1 against re-hearing. The full panel of nine judges decided 7-2 against re-hearing.

While Bamford's case was awaiting a decision on re-hearing, the Federal Communications Commission Review Board issued an opinion in the matter of *A.C. Elliott, Jr.*, 36 Pike & Fisher RR 2nd 1521 (1976) (not yet published in the official FCC reports). The FCC Review Board reversed course and excused a number of alleged deficiencies in an applicant's community survey which, under prior decisions, would have been considered fatal. Board Member Kessler issued a dissent saying, in effect, that if the Board accepted Elliott's survey, it should call back Bamford and accept his survey. Responding directly to the majority opinion in the Court of Appeals, which refused Bamford relief because he had already "had three chances," Board Member Kessler pointed out that in the Elliott case, the Board had elected to give the applicant not three but *five* chances. She wrote:

"I further believe that in the circumstances of this case where the majority's decision is focused on their conception of fair notice requirements in conflict with the fundamental and traditional benchmarks which, if meritorious, nevertheless, would affect the rights of other applicants in similar situations like *Bamford*, it is appropriate for the Commission to issue a stay with respect to the majority opinion pending resolution of the questions concerning the merit or lack of merit of their novel position, and to accord protection to existing applicants, like *Bamford*, in the exercise of their rights to an even-handed application of the law. Surely, if the applicant here is entitled to a *fifth* bite at the apple —

after one full and fair hearing — to perfect his ascertainment showing on the one fatal defect which the majority has found, let alone the numerous others which I have found in my *de novo* review of this record, based upon the reasonably comprehensible requirements of the *Primer* to men acting in good faith (see para. 6, *supra*), all other applicants in similar situations, who have preserved their rights as applicants are entitled to these same identical benefits. For otherwise, grievous injustices will be perpetrated upon them despite the fact that the Court has now approved the denial of Bamford's application, including the Judge's, this Board's and the Commission's denial of Bamford's petition for leave to amend to correct the deficiencies in his showing. See *Bamford*, Slip Op. 16-19."

The Board's decision having come too late to give relief to Bamford, either at the Commission level or in the Court of Appeals, Bamford hereby requests relief from this Honorable Court, believing, as he does, that it is grossly unfair to him to be disqualified while other, luckier applicants are found qualified and given a construction permit, merely because they happened to go before the FCC Review Board at a more propitious time, when the Board appears more inclined to be reasonable.

REASONS FOR GRANTING THE WRIT

1. The first and primary reason for granting certiorari in this case is to prevent a grievous miscarriage of justice. As shown above, Petitioner, A.V. Bamford, has preserved fully all of his rights of review. His application was

denied for alleged deficiencies in his survey. Now, *subsequent* to the decision of the Court of Appeals, the FCC Review Board has reversed its policy and has granted an application by one A.C. Elliott, Jr., whose survey was subject to more serious "deficiencies" than those attributed to Bamford, and who was given far more opportunities to correct those "deficiencies" than was Bamford. The board member who wrote the Bamford decision has, herself, written a dissent stating, in substance, her fervent desire that the Bamford case and others like it could be brought back before the Commission in order that Bamford and other similarly affected applicants could receive the benefits of the new policies now in effect. Indeed so. It is fundamentally unfair for Bamford to have spent several years of his life and many thousands of dollars attempting to comply with vague and nebulous Commission survey requirements, only to be denied a construction permit, while those applicants who follow Bamford are permitted to make only sketchy and superficial efforts, yet nevertheless are granted a license. This Court, alone, has the authority to remand the Bamford case to the Commission, so that Bamford can avail himself of the more relaxed standards being applied to other applicants. Failure to remand the case for that purpose will mean that Bamford, like some other applicants, has been the victim of selective enforcement of survey standards which the Commission elected to apply to him and a few others, but has not elected to apply to more-favored applicants, such as A.C. Elliott.

2. Reason number 2 for granting certiorari is that this case involves issues of broad concern to the communications law fraternity. In the years following the development of the Commission's "Primer on the Ascertainment of Community Needs", some 16 applicants have had their

applications denied for alleged failure to make adequate surveys. These 16 cases are as follows:

- (1) *Bud's Broadcasting Company*, 32 Pike and Fisher RR 2d 1290 (Rev. Bd., 1975).
- (2) *Eastern Broadcasting Company*, 32 RR 2d 601 (1975).
- (3) *Bangor Broadcasting Corp.*, 32 RR 2d 409 (Rev. Bd., 1974).
- (4) *Centreville Broadcasting Co.*, 32 RR 2d 251 (Rev. Bd., 1974).
- (5) *Zia Telecommunications, Inc.*, 32 RR 2d 91 (Rev. Bd., 1974).
- (6) *Folkways Broadcasting Co., Inc.*, 31 RR 2d 427 (Rev. Bd., 1974).
- (7) *Voice of Dixie, Inc.*, 30 RR 2d 851 (1974).
- (8) *Southeast Arkansas Radio, Inc.*, 30 RR 2d 769 (Rev. Bd., 1974).
- (9) *Azalea Corp.*, 30 RR 2d 584 (Rev. Bd., 1974).
- (10) *Dowric Broadcasting Co., Inc.*, 29 RR 2d 1059 (Rev. Bd., 1974).
- (11) *James E. Reese*, 29 RR 2d 903 (Rev. Bd., 1973).
- (12) *Morris's, Inc.*, 28 RR 2d 1723 (Rev. Bd., 1973).
- (13) *Caprock Radio, Inc.*, 28 RR 2d 240 (In Dec'n, 1973).
- (14) *Pleasant Broadcasting Co., Inc.*, 27 RR 2d 1187 (Rev. Bd., 1973) (see also, 27 RR 2d 257).

(15) *Childress Broadcasting Corp. of West Jefferson*, 25 RR 2d 711 (Rev. Bd., 1972).

(16) *Frank M. Cowles*, 25 RR 2d 475 (Rev. Bd., 1972).

In each of the above cases, an applicant spent thousands and thousands of dollars to process an application through hearing only to lose his entire investment because his ascertainment efforts were found inadequate. The sheer number of these cases should make it clear that, contrary to the majority opinion of the Court of Appeals, the standards for ascertainment were *not* clear and understandable. If the standards had been clear and readily understandable, each of these 16 applicants would certainly have adhered to those standards closely in order to avoid the potential loss of many years of time and many thousands of dollars of expense. The "warnings" given to Bamford, which are set forth in the majority opinion of the Court of Appeals, were no different from the "warnings" given to each of the applicants in the above cited cases. In virtually all of these cases, also, the applicants attempted to extricate themselves from the traps laid for them by making new surveys and amending their applications. If the "warnings" had been sufficiently clear, none of these 16 applicants would have had their application denied. They would have simply responded to notices given them and conducted an acceptable survey. The problem is that, like Bamford, these applicants received only vague and nebulous admonitions to do a "good job"; they were not told *in advance* what constituted a "good job". It was only after they had made their surveys and gone through a lengthy hearing that the FCC Hearing Division finally advised them that their survey was considered inadequate.

3. Reason number 3 for granting certiorari relates to the vote in the Court of Appeals. The Court split 2-1 in its original decision. On re-hearing, the Court divided 7-2, but Judge Van Pelt (a district judge who is sitting temporarily on the Court of Appeals) also voted for re-hearing, making the vote 7-3. There are still pending before the Court two cases involving essentially the same issues as the Bamford case: *F.L. Crowder, tr/as Harriman Broadcasting Company vs. FCC*, Case No. 75-2008; and *Folkways Broadcasting Company vs. FCC*, Case No. 76-1196.³ The split vote of the three-judge panel in *Bamford* and the additional split vote on re-hearing indicates that the judges of the United States Court of Appeals for the District of Columbia Circuit are not unanimous in their appraisal of the issues in this case. Thus, if this Court does not take the case, there exists the possibility that, as additional cases are decided, there may be differences between panels of the Court of Appeals.

4. Reason number 4 for this Court to grant a writ of certiorari lies in the recent actions of the Commission, described above, clarifying and codifying the standards for making surveys of community leaders. Although the Commission argued, and the Court of Appeals agreed, that such standards are only applicable to renewal applicants, we respectfully submit that the *list of categories* of community leaders to be interviewed must necessarily be valid not only for renewal applicants but for all other applicants before the Commission. That list is intended to represent

³ Still another case, *Mobile Broadcast Service, Inc. vs. FCC*, was decided adversely to the appellant on April 20, 1976, and it is anticipated that the appellant there may also petition for certiorari in the Supreme Court.

the Commission's view with respect to a representative cross-section of community leaders. It cannot be logically contended that the list of 19 categories is a representative cross-section for one purpose and not for another purpose. The fact that the Commission chose to issue such a list at this time constitutes a left-handed admission by the Commission that a list was needed, because the standards set forth in the original "Primer" — used by Bamford — were too vague and indefinite and did not give applicants adequate guidelines upon which to base their surveys.

5. Reason number 5 for granting certiorari is the reason referred to by Judge Van Pelt in his dissent. Bamford, himself, is a Spanish-speaking American of Latin descent. He interviewed four prominent Spanish-Americans, all of whom were unquestionably "community leaders". The decision of the Review Board that these interviews did not count because the community leaders were not officers or officials of Hispanic organizations was, and is, simply outrageous. Nothing in the Commission's "Primer" or in any of the case law could have given Bamford any warning that to be a community leader of the Hispanic community, somebody had to be an official of an Hispanic organization.

6. Reason number 6 for granting certiorari is simply that the Court of Appeals erred when it read into the "Primer" the various comments and illustrations given by the Commission in its Report and Order when it adopted the "Primer". The "Primer" itself said absolutely nothing about interviewing welfare recipients. One of the illustrations or examples given in the Report and Order accompanying the "Primer" does mention welfare recipients. But, there was nothing in the "Primer" itself to indicate that welfare recipients were a required category, nor does

the Report and Order specify that welfare recipients are a required category. Even if they were a required category, Bamford had interviewed welfare recipients and the only reason that these interviews did not become a part of the record is that the FCC Administrative Law Judge refused to receive the evidence of these interviews. Moreover, the judge gave no substantial reasons for refusing to accept such evidence. This in itself constituted a reversible error — an error especially grievous to Bamford because, in subsequent cases, the Commission has been lenient in allowing applicants to amend their community survey showings to comply with Commission requirements. Cf., *A.C. Elliott cited supra*.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

LAUREN A. COLBY
Attorney for Petitioner

APPENDIX A

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1309

A. V. BAMFORD, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Appeal from the Federal Communications Commission

Argued November 25, 1975

Decided March 29, 1976

Lauren A. Colby for appellant.

Stephen A. Sharp, Counsel, Federal Communications Commission, with whom *Ashton R. Hardy*, General Counsel and *Daniel M. Armstrong*, Acting Associate General Counsel, Federal Communications Commission, were on the brief for appellee.

Before: DANAHER, *Senior Circuit Judge*, LEVENTHAL, *Circuit Judge* and VAN PELT,* *United States Senior District Judge* for the District of Nebraska

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Opinion for the Court filed by *Senior Circuit Judge DANAHER*.

Dissenting opinion filed by *Senior District Judge VAN PELT*.

DANAHER, *Senior Circuit Judge*: This is an appeal pursuant to 47 U.S.C. § 402(b)(1) from a decision of the Review Board of the Federal Communications Commission (Board)¹ denying petitioner Bamford's application for a construction permit² for a *new* FM broadcast facility in Corpus Christi, Texas. 48 FCC 2d 1155 (1974). The denial was based solely on a finding of failure to comply with the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971). In so holding, the Board reversed the Initial Decision entered by the Administrative Law Judge (ALJ) who had only grudgingly approved issuance of the permit on a finding of "minimal" compliance with the Primer, despite a fragmented presentation characterized as "haphazard in the extreme." 48 FCC 2d 1161 (1974). Petitioner urges reversal essentially on a claim of vagueness of certain Primer standards resulting in a lack of notice, but additionally he argues that the Board erred in refusing to allow him to amend his application. After careful review of the

¹ The Commission denied review of the Board's decision on February 25, 1975, thereby giving it the force and effect of a Commission decision. 47 U.S.C. § 155(d)(3).

² A construction permit is a prerequisite to the issuance of a new station license and, "except in rare instances, it is also a guarantee of a license to operate the station once constructed." *Fidelity Television Inc. v. F.C.C.*, — U.S. App. D.C. —, —, 515 F.2d 684, 688 n. 2 (1975). Because of the importance attached to a construction permit determination, a particularly heavy burden is placed on both the applicant and the Commission to establish that issuance of the permit will comport with the public interest.

materials of record as pertinent here, we affirm the decision of the Commission.

I. BACKGROUND

As part of its mandate to regulate the broadcasting industry in the public interest,³ the FCC has required applicants to familiarize themselves with the needs, interests and problems of the groups comprising the communities proposed to be served, to document such familiarity in license applications, and to submit programming proposals responsive to such needs. The primary purpose of this requirement is to guarantee

"that the programming service will be rooted in people whom the station is obligated to serve and who will be in a much better position to see that the obligation to them is fulfilled, thus lessening the enforcement burden of the Commission."

"Public Notice Relating To Ascertainment of Community Needs by Broadcast Applicants," FCC 68-847, 13 R.R. 2d 1903 (1968). The requirement has evolved gradually, beginning with the Commission's *En Banc Programming Inquiry*, FCC 60-970, 20 R.R. 1901 (1960),⁴ and continuing, with some confusion,⁵ to the present time. See,

³ 47 U.S.C. §§ 307(a), (d), and 309(a); see, *Henry v. F.C.C.*, 112 U.S. App. D.C. 257, 302 F.2d 191, cert. denied, 371 U.S. 821 (1962).

⁴ There it was stressed that the Commission

"does expect its broadcast licensees to take the necessary steps to inform themselves of the real needs and interests of the areas they serve, and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests."

20 R.R. at 1913.

⁵ At one point the Commission was constrained to recognize "that there is wide disagreement over the details that

Ascertainment of Community Problems by Broadcast [Renewal] Applicants, 41 Fed. Reg. 1371 (January 7, 1976). The importance of the requirement was reflected in the Commission's landmark decision in *City of Camden et al.*, 18 FCC 2d 412 (1969), where it refused to approve the voluntary assignment of a station license because of the failure of the assignee adequately to survey the community sought to be served. The issuance of the *Camden* decision was followed by a flurry of activity at the Commission, and in December 1969 the Commission issued a Notice of Inquiry on the ascertainment standards and published a proposed Primer designed to answer requests for clarification submitted by applicants and the Federal Communications Bar Association. 20 FCC 2d 880. Shortly thereafter, the Commission published an "Interim Procedure" which had the effect among other things of staying all pending proceedings until the Primer was issued in final form. *Community Survey Showings—Interim Procedure*, 22 FCC 2d 421 (1970). The Primer and an accompanying detailed Report were formally promulgated on February 23, 1971, and pending proceedings were finally allowed to go forward with an opportunity being allowed for applicants to revise community ascertainment showings in order to comport with the standards set forth in the Primer. 27 FCC 2d 650.

The Primer established a relatively detailed set of guidelines for applicants to follow, each applicant thereafter being bound to provide the Commission with detailed information on certain required steps, and thus indicating a genuine awareness of problems in the areas sought to be served. Accordingly as presently pertinent, the Commission required each applicant to: (1) under-

should be required of an applicant in reporting on ascertainment of community needs and interests." *AM & FM Program Form*, 1 FCC 2d 439, 442 (1965).

take a compositional study of the area designed to determine "significant groups" therein; (2) seek out and interview "leaders" or "spokesmen" for each such group to determine their perception of local needs and problems; (3) conduct a "roughly random" survey of the general public's perception of such needs and problems; (4) evaluate the problems thus uncovered; and (5) submit programming proposals designed to assist in the resolution of these problems.

Petitioner submitted his application for a construction permit on January 20, 1970, in the midst of the confusion which preceeded publication of the Primer. The application was designated for hearing on certain issues, including the community survey issue, on November 18, 1970, but was postponed at the request of petitioner's counsel pending publication of the Primer. The Primer was released on February 23, 1971, and in May of that year petitioner conducted a series of interviews designed to comply with the Primer and submitted the results in an amendment to the application filed on June 7, 1971. Hearings were then held in September, and as a result petitioner conducted an additional survey in October, supplemented it in December, and filed the results as a second amendment to the application. Following a hearing on the new survey, the record was closed on January 27, 1972.

As a result of these survey showings, Bamford could demonstrate interviews with 45 community leaders, drawn primarily from a broad base of civic and business organizations, J.A. 68, 48 FCC 2d at 1167. He could additionally show interviews with 23 members of the general public,⁶ and the receipt of reply post card

⁶ These 23 individuals, included in the May 1971 survey, were determined to be "de facto" members of the general public after Bamford failed to designate them as community leaders.

questionnaires from 50 additional members of the general public.

The non-ascertainment issues involved in the Corpus Christi application were severed at the request of the Commission Staff, 31 FCC 2d 701 (1971) and consolidated for hearing with similar issues in another proceeding involving petitioner's application for a broadcast station in Colorado. 32 FCC 2d 773 (1972). The Corpus Christi proceeding remained dormant until the consolidated Colorado hearing was resolved favorably for the petitioner on June 16, 1973. 41 FCC 2d 835. Thereupon, the Administrative Law Judge reactivated the Corpus Christi proceeding and established a date for the filing of proposed findings. In the meantime petitioner conducted a new survey of the area in October 1973, and attempted to reopen the record for submission of the new results. The ALJ denied this request, but concluding that Bamford had minimally achieved essential compliance, he released his initial decision on February 15, 1974, and granted the application.

The Commission Staff appealed the ruling to the Review Board which, after hearing oral argument, rendered a decision reversing the ALJ and denying the application. Petitioner then appealed to the Commission which declined review, thus finalizing the Review Board's determination. The Board found that petitioner had presented an inadequate survey of community problems: he had failed to undertake an adequate compositional survey of the Corpus Christi area; he had failed to interview "leaders" of significant groups in the city, specifically Spanish-Americans and welfare recipients; and he had failed to conduct a "random" survey of the general public.⁷

⁷ The 23 members of the general public, *see* n. 6, were found to be not randomly selected and, thus, this aspect of the gen-

II. THE ISSUES ON APPEAL

As a preliminary matter, we note that whatever other factors may have contributed to the haphazard ascertainment showing involved here, certainly the inadequacy of the composition study played a direct role. The composition study serves as the basis for the survey of "leaders" of significant groups, and is therefore a crucial component of a community needs survey.⁸

Petitioner's composition study was in two parts. The first, submitted with the May 1971 amendment, con-

eral public survey was not in compliance with the Primer. The results of the mail survey were disallowed since the Primer proscribes the use of survey techniques which "require the interviewee's voluntary return of the questionnaire by mail." ¶ 46 of the Primer, J.A. 9, 27 FCC 2d at 668. Such findings were clearly appropriate.

⁸ The Answer to Question 10 of the Primer states in pertinent part:

The purpose of requiring a determination of the community is to inform the applicant and the Commission what groups constitute the community. The applicant must use that information to select those who are to be consulted as representatives of these groups. That determination may be challenged on a showing, including supporting data, that a significant group has been omitted."

J.A. 14, 27 FCC 2d at 683. The Commission does not demand that an applicant undertake an independent sociological study of the area, but rather that he

"submit such data as is necessary to indicate the minority, or ethnic breakdown of the community, its economic activities, government activities, public service organizations, and any other factors or activities that make the particular community distinctive."

Id. This information may be obtained from the U.S. Census Bureau, the local Chamber of Commerce, or other reliable sources.

sisted of a copy of a single page from the 1970 Census containing information on race, age, and head of household status for the population of Corpus Christi. The second, submitted with the October 1971 survey, contained a list of service, professional and trade organizations in the area, as well as information concerning the industrial life of the city and a general description of the nature of its work force. No information was submitted detailing the income distribution in the area. Had such information been obtained, petitioner would have been aware that over 18 per cent of the population of the Corpus Christi area was below the poverty level.

A. *The Leadership Survey*

Bamford charges that the Primer provided him with insufficient notice of certain requirements concerning the leadership survey. He claims that the Primer did not inform him that the term "leader" referred only to a person holding an official position in an organization, and that it did not indicate that welfare recipients were embraced within the phrase "significant group."

It is beyond dispute that an applicant should not be placed in the position of going forward with an application without knowledge of requirements established by the Commission, and elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected. As Judge Leventhal stated in *Radio Athens, Inc., (WATH) v. F.C.C.*, 130 U.S. App. D.C. 333, 339, 401 F.2d 398, 404 (1968) (dismissal of application without hearing for patent non-conformance with Commission rules):

"The Commission is entitled to expect good faith on the part of the broadcasting industry in supplying data requested. The industry is correspondingly entitled to expect rules defining the required content of applications that are *reasonably comprehensible*

to men acting in good faith." (emphasis added) (footnote omitted).

If an applicant ignores or fails to understand "reasonably comprehensible" requirements, he cannot be heard to complain about lack of notice."

The Review Board found that Bamford had failed to interview "leaders" of the Spanish-American population group in Corpus Christi,¹⁰ and that "[t]his deficiency, standing alone, is sufficient basis" for the denial of the application. J.A. 76, 48 FCC 2d at 1158. The Commission thereby discounted petitioner's interviews with four Spanish-Americans holding prominent positions in the Corpus Christi community—a judge, a city councilman, a pastor of a Roman Catholic Mexican-American church, and the county clerk who was also president of the Knights of Columbus—holding that these individuals were not "leaders" of the Spanish-American community. While the Board does not clearly indicate its reasoning, it appears that it defined "leader" in this instance as one who heads a formal "group" organized for the purpose of advancing the cause of a special interest or of an

⁹ Cf., *Ranger v. F.C.C.*, 111 U.S. App. D.C. 44, 46, 294 F.2d 240, 242 (1961), where the court said:

"We think an applicant for a radio license who either ignores or fails to understand clear and valid rules of the Commission respecting the requirements for an application assumes the risk that the application will not be acceptable for filing."

¹⁰ It is conceded that the Spanish-American population of Corpus Christi constitutes a "significant group." Neither compositional study submitted by petitioner indicated the size of this group. Bamford at first estimated that Spanish-Americans constituted 48 per cent of the population, but later modified that figure to 35.7 per cent after consulting with the Corpus Christi Chamber of Commerce.

ethnic or nationality group.¹¹ Petitioner, on the other hand, believed—or at least his actions indicate that he believed—that a “leader” is one who holds a traditional position of authority and respect within the general community and who also happens to be a member of the “target” ethnic or racial group. Such a view appears to have been based on the notion that when a member of a minority group achieves a position of prominence—such as a judge or an elected official—that person automatically becomes a spokesman for, or a representative of, the minority group. While this expression may represent a somewhat outdated concept, we cannot say that it is patently invalid, nor can we find any language in

¹¹ The language employed by the Board is less than clear. The Board stated that “none of the four Spanish-Americans interviewed . . . were shown to be leaders of this community (or even necessarily representative thereof).” J.A. 76, 48 FCC 2d at 1158. Thus it is not clear whether the Board views “representativeness” as a quality severable from that of leadership. In a footnote to the above quoted statement, the Board noted:

“In this connection, it is noteworthy that even though 35.7% of the Corpus Christi population is Spanish-American, Bamford was unable to locate leaders of representative organizations. The Commission has specifically addressed itself to this difficulty, stating, since ‘. . . an applicant may not arbitrarily avoid personal consultations with significant groups because the group lacks a highly developed formal structure, we believe that it is appropriate to [advise] . . . that additional efforts may be needed to identify leaders of less organized groups.’ 27 FCC 2d 650, 666, 21 RR 2d 1507.” 48 FCC 2d at 1158 n. 16.

The Board’s reliance in this language from the Primer appears to be misplaced, since the language is by its terms not directed at resolving problems of determining who are leaders, but rather at resolving problems of ignoring less organized groupings precisely because of the lack of a well defined organizational structure.

the Primer which reasonably can be said to proscribe it. Indeed, at no point does the Primer make any effort to provide a specific definition of “leader”; rather, it appears that the term was taken for granted. The construction adopted by the Board, when properly supported, may well be a permissible ruling, but it is not one to be applied without prior notice.

Even so, reversal and remand are not called for here since the Board additionally found that petitioner had totally failed to include in the survey of community leaders—however defined—any person in position to bespeak the interests of the poor. J.A. 76, 48 FCC 2d at 1168. Although this finding is strenuously opposed by counsel for petitioner, we find that his objections are without merit and that the Board’s finding presents an independent basis for its denial of the application. The Board noted that 18.4 per cent of the families in the Corpus Christi area were below the poverty level, and accordingly found that the poor constituted a significant group. The Primer provides that failure to include a significant group in the community leader survey “would make the applicant’s showing defective, since those consulted would not reflect the composition of the community.” J.A. 15, 27 FCC 2d at 684.

Petitioner now claims that this finding was lacking in fairness because it amounted to an unwarranted addition to the list of groups “required” to be contacted by an applicant, and that, therefore, he was without notice. This contention is without merit. Initially, we note that there is no such thing as a “required” list of groups to be consulted. The Primer assiduously avoids such rigidity in the recognition that communities differ in their composition.¹²

¹² Counsel would have us construe the following portion of the Primer as establishing an exclusive listing of significant groups:

[Continued]

In some situations, not present here, there could be at least some plausibility in a submission that the guidelines are too broad and vague respecting just what constitutes a "significant" group. The word "group", as used in the Primer, is "broad enough to include population segments, such as racial and ethnic groups, and informal groups, as well as groups with formal organization." J.A. 14, 27 FCC 2d at 682. The determination of the "significance" of the group, which triggers the need for a leadership survey, "may rest on several criteria, including its size, its influence, or its lack of influence in the community." J.A. 14, 27 FCC 2d at 683.

¹² [Continued]

"10. Question: If the applicant shows consultations with leaders of groups and organizations that represent various economic, social, political, cultural *and other elements* of the community, *such as* government, education, religion, agriculture, business, labor, the professions, racial and/or ethnic groups, and eleemosynary organizations, is the applicant still required to submit a showing in support of its determination of the composition of the community?

Answer: Yes. The purpose of requiring a determination of the community is to inform the applicant and the Commission what groups comprise the community. The applicant must use that information to select those who are to be consulted as representatives of those groups. That determination may be challenged on a showing, including supporting data, that a significant group has been omitted. The 'significance' of a group may rest on several criteria, including its size, its influence or its lack of influence in the community."

J.A. 14, 27 FCC 2d at 683. (Emphasis added).

Clearly the italicized language of the quoted material indicates the Commission's intent to have the "list" of "groups and organizations" function in an illustrative capacity only.

In the particular circumstances of this case, however, petitioner's claim of lack of notice must fail, for we find that there are sufficient references to the specific group found to be unrepresented in petitioner's survey in the Report which accompanied the publication of the Primer and also in pre-Primer Commission precedent.¹³ The Commission on several occasions in the Report indicated its concern for the needs and problems confronted by the poor and welfare recipients. Clearly evinced was an intent to require "leadership surveys" in instances where the poor constitute a significant population grouping.¹⁴ Such an intent can also be found in FCC decisions

¹³ Counsel for petitioner suggested at oral argument that the Report should not be considered determinative because it did not constitute an integral part of the Primer. This suggestion is patently without merit.

¹⁴ In the Report's response to the various comments submitted by interested parties, the following explanation was given:

"The Citizens Committee suggests that an applicant's obligation does not end with 'establishment' leaders, and includes 'voluntary associations and agencies dealing with the needs of the elderly, the *indigent* and the handicapped, with *welfare associations*, tenant groups, youth and student groups, property owners associations and other groups organized for the express purpose of protecting particular needs and interests.' *The question is whether those groups comprise a significant segment of the community*, not whether they fall within or without the 'establishment', however that word is defined. Leaders of the listed organizations should be consulted, if they represent a significant group within the particular community. Since all these groups or organizations listed by the Citizens Committee will not necessarily appear in all communities, it would be inappropriate to set them forth in a Primer that is generally applicable."

¶ 31, J.A. 7, 27 FCC 2d at 662-663. (Emphasis added). While the Commission recognized the difficulty of identifying "leaders" of the groups lacking a highly developed formal

structure, *see* Question and Answer 13(a) of the Primer and relevant discussion in ¶ 39, J.A. 8, 27 FCC 2d at 666, it nevertheless required that they be sought out in the leadership survey. As an aid in assessing compliance, the Commission required the leader to be identified "by name, position and/or organization." Answer 20. To provide further guidance, the Report gave the following examples:

"... John Jones, Executive Vice-President, XYZ Corporation, would be an appropriate identification for a business leader. John Jones, 123 First Street, *spokesman for welfare recipients*, would be an appropriate identification for a leader of a group lacking a high degree of formal organization."

¶ 52, J.A. 10, 27 FCC 2d at 671. (Emphasis added).

Additionally the Commission gave rather extensive consideration to the problems of the poor in the context of discussing the ultimate purpose of the ascertainment guidelines—programming which responds to the problems of the community. Following publication of the proposed Primer, a comment was received from the National Association of Broadcasters, Inc., (NAB), which suggested that the dominant format of the broadcaster should determine which problems should be addressed in the programming proposals; for example, a "rock" station would be most effective in treating problems germane to a predominantly young audience. This proposal was rejected by the FCC with the following explanation:

"Under the rationale of the NAB, since welfare programs are 'germane' to the poor, two of the stations in the city might ignore or only minimally treat these problems for the reason that their audiences have relatively few poor people. That is an undesirable result. We do not accept the thesis that all those who might be eligible for the welfare programs do not listen to popular, "rock" or classical music. Moreover, the inadequacy of the city's welfare program might well be a topic of news, discussion, and editorials on all three stations. However, we believe the applicant's knowledge of his audience may properly be used in the following manner. The station with an audience that has a large proportion of poor people might emphasize the services available, the criteria for eligibility, and locations where those who are

issued *prior* to development of the Primer.¹⁵ Under these

eligible should call or go to avail themselves of the services. The "rock" station might emphasize the need for volunteers while the popular station might emphasize the need for volunteers and for contributions to the program sponsored by the eleemosynary organization. These are offered only as possible ways of meeting a community problem. Innovative broadcasters would, no doubt, have different points of emphasis or other means of meeting the problems."

¶ 58, J.A. 10-11, 27 FCC 2d at 673. *See also*, ¶ 17, J.A. 4, 27 FCC 2d at 656.

¹⁵ For example, this concern was expressed by the Commission in the important decision *City of Camden et al.*, 18 F.C.C. 2d 412 (1969). There the Commission denied the application of the City of Camden, New Jersey, and the McLendon Corporation for approval of the voluntary assignment of a station license from the city to the corporation, finding that the proposed programming was designed more for Philadelphia than for Camden, the city of license. The Commission based its holding, in part, on an inadequate demographic study of Camden and a failure to contact, among others, representatives of the poor. 18 FCC 2d at 422. The Commission found that the proposed programming reflected the lack of depth in determining the needs of the community. *Id.* More importantly for our purposes, it found that the station was

"... of particular significance to the economically disadvantaged in Camden, and possibly the cheapest and most effective way of bringing to the attention of such groups matters of interest to them, such as job-training programs, education programs, bus schedules, where unemployment compensation can be obtained, how one goes about getting food if he cannot feed his family, available medical or clinical service, what is happening in the immediate neighborhood, the meetings that are being held, and the opportunities to participate in elections. Indeed, a radio station to an important extent actually helps define the citizen's sense of community and thus builds his feeling of participation in—or exclusion from—community affairs. Yet there is no clear evidence that the McLendons sought to explore and evaluate the press-

circumstances, we believe that adequate notice was provided petitioner that should the poor constitute a significant group in Corpus Christi he was required to consult with their "leaders" or "representatives". Moreover, we believe that the Review Board's determination that a group constituting nearly twenty per cent of an area's population is significant was justified. Under the terms of the Primer the application was properly denied because of this "deficient" ascertainment showing.¹⁶ It was petitioner's *failure* to show consultation with anyone arguably bespeaking the interests of Corpus Christi's poor, and his claim that such consultations were not required by the Primer which lead us to this conclusion. Therefore, the problems we address with reference to the survey of Spanish-American "leaders" are not present.

B. *The Petition for Amendment*

A closer question is presented in petitioner's claim that the Commission improperly denied his request to reopen the record for submission of a new ascertainment survey conducted in October 1973. It will be re-

ing needs of the economically disadvantaged in Camden in developing programming proposals. This is an example of the superficiality we find in the applicant's proposal."

Id. at 423. (Emphasis added).

¹⁶ The Answer to Question 16 of the Primer states: "The omission of consultations with leaders of a significant group would make the applicant's showing *defective*, since those consulted would not reflect the composition of the community." J.A. 15, 27 FCC 2d at 684. (Emphasis added). This language was substituted for that contained in the proposed Primer, 20 FCC 2d 800 (1969), which merely stated that the ascertainment process was "subject to question", and thus represented a significant increase in the sanctions imposed. *See generally*, ¶ 44, J.A. 9, 27 FCC 2d at 668; *Voice of Dixie, Inc.*, 45 FCC 2d 1027, 1029-1030, *recon. denied*, 47 FCC 2d 526 (1974).

called that the survey materials contained in the record were two years old at the time of the request because of a Commission-imposed dormancy in the Corpus Christi proceeding. *See*, 32 FCC 2d 773 (1972); 31 FCC 2d 701 (1971). The Corpus Christi proceeding was free to move forward after July 16, 1973, 41 FCC 2d 835, and following conference with counsel, the ALJ set November 19, 1973 as the date for the filing of proposed findings. On November 12 counsel for Bamford requested a postponement of the filing date and a reopening of the record to allow submission of a new survey of community needs conducted sometime in October. The purported justification for this request was an asserted "on-going ascertainment" requirement of the Primer, and a need to overcome "the potentially disqualifying community needs issue."¹⁷ The ALJ denied the petition on the ground that Bamford had failed to show good cause as required by Section 1.522(b) of the Commission's rules.¹⁸ Ten days later the ALJ denied a Petition for Reconsideration of those parts of the previous Order relating to the new survey, but granted

¹⁷ J.A. 58. The full justification, as set forth in the ALJ's order of denial, was as follows:

"2. Acceptance of this amendment is respectfully requested. The taking of a supplemental survey to up-date the previous data—the most recent of which is now two years old—is both justified and required by the so-called 'on-going ascertainment' requirements of the Primer. The acceptance of the amendment should not delay the proceeding more than a few weeks at most, and will ensure that Bamford overcomes the potentially disqualifying community needs issue and is able, therefore, to start rendering a new service to the public at the earliest possible date. Good cause exists, therefore, for this amendment."

¹⁸ 47 C.F.R. 1.522(b) provides in relevant part: "Requests to amend an application after it has been designated for hearing . . . will be granted only for good cause shown."

the requested extension of time within which to file proposed findings. J.A. 60. The orders of the ALJ are far from being models of clarity, yet they allow for sufficient insight into the reasons for denial. Cf., *Greater Boston Television Corporation v. F.C.C.*, 143 U.S. App. D.C. 303, 392-395, 444 F.2d 841, 850-853 (1970), *cert. denied*, 403 U.S. 923 (1971). The claim of an on-going ascertainment requirement for a *non-renewal* applicant was rejected by the ALJ, and properly so since no such requirement exists in the Primer. We are constrained to state, however, that if the sole, or even primary, reason for the proposed amendment had been the need to update the old surveys so as accurately to present a current assessment of the community's problems, we could not agree with the determination. The purpose of the ascertainment survey is to make the broadcaster aware of and responsive to community problems. Undoubtedly problems and needs change over a period of time, and if the survey and proposed responsive programming requirements are to have any meaning they must be reasonably current—otherwise the survey becomes a fruitless exaltation of form over substance.

However, as we read the record, it appears to us that the ALJ concluded that petitioner was merely attempting to overcome the blatant deficiencies of the previous ascertainment efforts. Petitioner had candidly admitted in the petition that he was concerned over the "potentially disqualifying" ascertainment issues, and had re-emphasized this concern in his Petition for Reconsideration.¹⁹ Had this been petitioner's first attempt to reopen the record following publication of the Primer, a different situation would be present. 27 FCC 2d at

¹⁹ The ALJ noted that "Bamford's counsel merely assumes the responsibility for prior deficiencies which he says should not be imputed to Bamford." J.A. 60.

680; see also, *Risner Broadcasting Inc.*, 28 FCC 2d 330 (1971); cf., *Sioux Empire Broadcasting Co.*, 16 FCC 2d 995 (1969). It was his *third* attempt, however, and under such circumstances we believe the denial was permissible.²⁰

Judgment accordingly.

²⁰ We cannot ignore the Commission's duty to make certain that the public convenience, interest and necessity will be served when a new construction permit is sought. See footnote 2, *supra*. In the highly technical area under consideration here, we surely are bound to accord great deference to the Commission's construction and administration of its own regulations in meeting essential statutory requirements. *Udall v. Tallman*, 380 U.S. 1 (1965); *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961).

VAN PELT, *Senior District Judge* (dissenting)

I respectfully dissent from the excellently written majority opinion which accurately reflects the issues and the evidence.

I cannot subscribe to the finding of the Review Board that Bamford had failed to interview leaders of the Spanish-American population group at Corpus Christi. The four Spanish-Americans interviewed, as shown by the majority opinion, are "a judge, a city councilman, a pastor of a Roman Catholic Mexican-American church, and the county clerk who was also president of the Knights of Columbus." I am unable to believe in a community in which Spanish-Americans constitute 35.7% to 48% of the population (see note 10, majority opinion) that for a Spanish-American to be elected a judge, city councilman, or a county clerk is not prima facie evidence of his or her leadership. As to the approximately 18% of the population who are below the poverty level, I would feel critical of any survey of a poverty group in such a community which did not include a conference with a priest of a Roman Catholic Mexican-American church. I am not a member of that religious group but my experience teaches me that almost uniformly Catholic priests are well informed as to the poverty needs of their community.

I would sustain the petitioner's request to reopen the record for the submission of new survey material.

APPENDIX B

Before the APP. 61
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

17408

In re Application of)	
)	
A.V. BAMFORD)	DOCKET NO. 19089
Corpus Christi, Texas)	File No. BPH-7006
)	
For Construction Permit)	

Appearances

Lauren A. Colby and Richard J. Tarrant, on behalf of A.V. Bamford; and *Charles W. Kelley, Philip V. Permut and Katherine S. McGovern*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE FREDERICK W. DENNISTON

Issued February 12, 1974;

Released February 15, 1974

Preliminary Statement

1. This proceeding was designated for hearing by the Commission by Order released November 18, 1970 (FCC 70-1220).¹ Due to the dismissal of the competing application, only two issues remained herein, a financial issue

¹ The Designation Order included a competing application, Docket No. 19090, Community Service Radio, Inc., which application was dismissed with prejudice for failure to prosecute by Order released December 31, 1970 (FCC 70M-1772).

and a community ascertainment issue. For the reason enumerated below, only the community ascertainment issue survives, as follows:

To determine the efforts made by A. V. Bamford to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.

2. This application was originally filed by a partnership consisting of A. V. Bamford and Jack Beasley, doing business as The Big Chief, but subsequently Bamford, as an individual, was substituted as the applicant by Order released January 26, 1971 (FCC 71M-130); review denied, FCC 71R-142, 29 FCC 2d 154. Hearing conferences were held herein on December 29, 1970, January 22, April 6 and December 13, 1971, and hearings on September 20 and 21, 1971 and January 20, 1972. The record was closed by Order (FCC 72M-123) released January 27, 1972. Proposed findings were filed on January 4, 1974 by Bamford and the Broadcast Bureau of this Commission (Bureau) and each replied on January 18, 1974.

3. By Order released January 7, 1972 (32 FCC 2d 773), this application was consolidated with another application filed by Bamford, involving a proposed station in Colorado Springs, Colorado, together with competing applications at that city. The financial issue of the present application against Bamford was determined in that consolidated proceeding, wherein Bamford was found to be financially qualified, 41 FCC 2d 835.

4. Bamford, of San Antonio, Texas, is owner of Radio Stations KBER and KBER-FM in that city, and has been in radio since about 1940. He is of Latin American

descent, was born in Cuba, and speaks Spanish. He proposes an FM station on Channel 256, 99.1 MHz, from an antenna on top of the Sheraton-Marina Inn in Corpus Christi.

Evidentiary Ruling

5. At the hearing, Bamford offered testimony and an exhibit (Bamford Ex. No. 7) covering interviews he conducted on December 10, 1971, with four blacks in Corpus Christi. The same four had previously been interviewed by Dennis Griffin, the general manager of Bamford's station in San Antonio, at the request of counsel, on June 4, 1971, while Bamford was out of the country (Bamford Ex. No. 4). Due to objection by Bureau counsel, a ruling on the admissibility of the exhibit (excluding a portion ordered stricken) was deferred. In its proposed findings, the Bureau does not further discuss the admissibility of the exhibit, but its proposed findings assume it is not of record, although it accepts Griffin's efforts on Bamford's behalf. Since Bamford did, in fact, reinterview the same persons, as well as discuss with Griffin the latter's efforts, it is appropriate to accept the results of Bamford's own efforts. Accordingly, Bamford Ex. No. 7 (excluding the stricken portion) is received in evidence.

Findings of Fact

The Ascertainment Issue

Community Composition

6. According to the General Population Characteristics of the 1970 Census, and other data submitted by Bamford, Corpus Christi has a population of 284,832, of which 269,623 are classified as white, 12,241 as Negro, and 2,968

as "other." Of the total population, 139,415 are male (5,882 Negro male) and 145,417 are female (6,369 Negro female). The city has a large Mexican-American surnamed segment which, in the absence of a breakout from the white figures in the Census, Bamford estimated at 48%. Bamford considered the ratio of Mexican-Americans at about the same as in San Antonio, which he deems very similar in composition. He also indicated that the Chamber of Commerce had advised him the Mexican-American surnamed represented 35.7% of the population. Whichever percentage is correct, it is apparent the Mexican-American surnamed are a substantial proportion.

7. In addition to state facilities, there are Army, Navy, Coast Guard and NASA installations in Corpus Christi which employed, according to 1967 statistics, 4,389 federal employees. There are various other industries, including Reynolds Metal, PPG Industries, Cellanese Chemical, and gas and oil refining companies. Non-federal employees, in 1967, accounted for 48,360 persons. One-family dwellings account for 90% of the housing units. There are 30 service organizations, some with multiple units, and 92 professional and trade organizations in the area, all listed of record.

The Survey

8. Bamford made his first survey on May 12 and 13, 1971 when he interviewed 45 persons, of which he considered 22 to be community leaders, and the remainder as members of the general public. The persons in Corpus Christi contacted personally by Bamford, their area of interest, and designation by Bamford as community leaders are:

1. *Terry Ferrell, advertising executive and Executive Director of Texas Seashore Party, Inc. (a tourism sponsor)

2. *Toi Clark, airline assistant manager, Tourist Bureau of Chamber of Commerce
3. *Jim McKinley, business agent, National Maritime Union
4. Erwin Jaloway, Coastal Bend Opportunities Center, Inc. (education of retarded children)
5. *Joe Salem, state representative, Optimist Club
6. Ed Balfanz, Associated General Contractors and Rotary Club
7. E. H. Mathews, U.S. Department of Agriculture
8. *John M. Luby, farm leader
9. John D. Weaver, agriculture and Lions Club
10. *Johnny Mitchell, sheriff
11. *Joe Luciano, restaurant owner and association, Corpus Christi Sparkler (tourism sponsor)
12. Howard Grunwald, printer, Texas Manufacturers Association, Optimist Club
13. Method Snapka, president, Restaurant Association, Kiwanis Club
14. *Charles Randall, assistant manager, The Coliseum, Buccaneer Days (tourism sponsor)
15. Bob Sterling, sales representative, Knights of Columbus, Moose Lodge, Veterans of Foreign Wars
16. John Morrow, Coastal Bend Opportunities Center, Inc. (education of retarded children), president of Association for Children with Learning Disabilities
17. Terry Ferrell, Sr., director and past local president of American Federation of Musicians
18. *J.P. Anderson, buyer, Rotary, Lions and Kiwanis Clubs

19. Mrs. E.K. Fields, secretary, Educational Chairman of National Secretaries Association, National Skeet Shooters Association
20. Art Sarman, Laundry and Cleaners Business, Chamber of Commerce
21. Doyle Brown, Hotel-Motel Association, Chamber of Commerce
22. Don Whitson, general manager, 3-M Company
23. *Ronnie Liedeker, banker, Jewish leader, Country and Yacht Clubs
24. Carl Rippert, salesman
25. *Leslie Chappel, County Civic Defense, Lions Eye Bank, Boosters Club
26. Gib Brownfield, agriculture, Lions Club
27. *Norman Ransleben, past president, Junior Chamber of Commerce
28. Pastor J.R. Aldepe, Iglesia Bautista Gollihar (Roman Catholic Mexican-American Church), Ministers Alliance
29. Charlie Nichols, drug store owner, American Legion
30. C.R. Jones, captain, Fire Department
31. Calvin Ramfield, county auditor, Kiwanis Club
32. *Alan W. Webb, general manager, hotel, Hotel Managers Association, Texas Sales Managers Association, Community Concerts
33. *George A. Finley III, president, wholesale hardware, Rotary Club, Little Theatre, YMCA

34. Map McCool, business representative, I.O.U.E.,² Citizens' Committee for Community Improvement, Veterans of Foreign Wars, Moose Lodge
35. *Barney Seal, realtor, Association of Realtors, Jewish
36. Hank Snyder, owner, furniture store, Cosmopolitan Club
37. *Bob Conwell, executive vice president, Tourist Bureau, Press Club, Advertising Club, Country Club, Rotary Club
38. *Bill Mobley, district attorney
39. *Dean Thorpe, convention manager, Chamber of Commerce
40. *Lloyd Hober, president, Postal Clerks Union
41. Charles Cabrera, independent businessman, Lions Club
42. *Judge Robert Barnes
43. *Oscar Soliz, County Clerk (elected), president, Knights of Columbus
44. *Margarito Garza, Judge
45. Mrs. C. Aubrey Smith, cashier, business women's group of church

* Designated by Bamford as community leaders.

² Apparently a transposition of "I.U.O.E. - International Union of Operating Employees."

Of the foregoing, four are female and three (including one female) are Mexican-American.³

9. Subsequently, on June 4, 1971, during Bamford's absence from the country, his counsel requested a further survey to include Negroes. Dennis Griffin, station manager of Station KBER in San Antonio, owned by Bamford, and the one on whom Bamford will rely initially to get the proposed station on the air, accordingly surveyed the four black leaders on that date. Later, subsequent to his return, Bamford interviewed the same four in person on December 10, 1971, except as to one who was ill at home and was interviewed by telephone. These were:

Maurice Colvin, Director of Human Relations,
City of Corpus Christi

Rev. R.L. Brown, Minister of AME Church and
member of Committee of 12 to bring about
integration of Negroes

Rev. Elliott Grant, Minister of Methodist Church,
member of Human Relations Department, City

Irvin Brown, President, NAACP

10. On October 19 and 20, 1971, Bamford conducted 22 additional interviews either in person or by telephone as follows:

Ronnie Sizemore, Mayor of Corpus Christi

Marvin Townsend, City Manager of Corpus Christi

³ While No. 28, Pastro Aldape, is designated on Ex. 3 as Caucasian rather than Mexican-American, he is obviously Mexican-American and is so accepted by the Bureau. Pastor Aldape is Pastor of a Mexican-American Church.

Bill G. Read, administrative assistant to Mayor
T. Ray King, City Secretary

Mrs. Howard Stark, teacher, Texas State Teachers Association

Charles Bonniwell, attorney, City Councilman

Rev. Harold T. Branch, City Councilman

Thomas Gonzales, insurance, City Councilman

James Avant, Police Chief of Corpus Christi

Margery Brown, Coliseum Manager

Helen Bechtel, director of Art Museum, past
president, Women's Committee of Chamber of
Commerce, Altrusa Club

Mrs. R. E. Clarke, president, League of Women Voters

Mrs. Herb T. Beard, past president, American
Association of University Women

Bertha Andrew, past president, Zonta International

Fran Beckman, president of Ad Club, Tourist
Bureau, Chamber of Commerce, Art Museum,
Little Theatre

Marylin Smith, executive secretary, United
Community Service

Jerry Sawyer, director, Boys Club

Arthur Scott, secretary, Goodwill Industries

Jim Jackson, director, Drug Abuse Council and
Nemo House

Ray Wayland, director of Young Life of Corpus Christi

O.S. West, office manager, Shriner

Paul Strunk, geologist, Catholic Youth Center

Of the foregoing, eight are females, one is black and one is Mexican-American.

11. Between October 18 to 25, 1971, Bamford mailed 500 double postcards to residents of Corpus Christi, Sinton, Robstown and Portland, Texas, on which about 50 replies were received. There is no indication of the communities from which those were received.

Ascertained Needs and Programming

12. The community needs identified as the principal ones in Bamford's initial survey were:

1. A convention center
2. A government complex, including a new courthouse
3. Tourism — promotion to attract
4. Liquor by the drink

13. The primary programming proposed by Bamford to meet these needs is a nightly five day a week, public affairs telephone call-in program "Corpus Christi Speaks." On this program, listeners will be invited to phone in and express their opinions concerning various issues of national, international and local interest. From time to time, guests will appear and answer questions phoned in by the listening audience. Guests will include civic officials, heads of worthy causes, etc.

14. Community leaders most concerned with the convention center and government building problems will be invited to appear on the program. It is hoped the resulting dialog will be twofold: public interest in the prob-

lems will be awakened, and ideas may be developed to promote a solution.

15. Everybody in Corpus Christi agrees that tourists are a good thing to help build up the community but the problem is how to attract them. Guests concerned with tourism will appear and discuss the problem, hopefully developing new ideas.

16. Liquor by the drink [subsequently adopted] would be treated in much the same manner.

17. The various other specific needs ascertained would be served by non-commercial spot announcements, such as spot announcements to promote racial brotherhood, availability of employment, education on the dangers of drug abuse, and to promote public support for law enforcement.

18. The supplemental survey indicated, by frequency of comments, the following needs in order:

1. Community center
2. Better housing
3. Restore North Beach
4. Need government complex
5. Tourism
6. Improve schools
7. Drug abuse
8. More police communication
9. Pollution
10. Better wages

19. Reiterating his intention to deal with these problems through the two described programs "Corpus Christi Speaks" and "Corpus Christi on the Grow," Bamford also intends to deal with the matter of community or convention center through editorials in support, as he will also

do with regard to the restoration of the North Beach area, also frequently mentioned. Moreover, two specials dealing with North Beach restoration are planned for presentation at 7:00 p.m., although the length is not indicated.

20. The lack of adequate housing, in addition to inclusion in "Corpus Christi Speaks," will be covered by a daily "Real Estate Roundup" from 12:00 to 12:05 p.m. Other programs to meet ascertained needs, such as drug abuse, will be included in five-minute weekly reports on police-community relations and a public affairs program "For a Better Police Department" will be broadcast on Sundays at 3:00 p.m. and repeated at 10:00 p.m. Non-commercial spot announcements on anti-littering and clean air will be broadcast on a public service basis.

Discussion

21. Bamford's presentation on this one issue (ascertainment of community needs) was haphazard in the extreme. While Bamford exhibited an attitude of seeking to achieve full compliance with Commission requirements, in response to cross-examination, he stated that as a layman he found the *Primer* confusing and that if it had included more specific instructions he would have complied. Apparently receiving minimal, if any, professional guidance, Bamford made a fragmented presentation consisting of personal surveys in May and October 1971, a postcard survey in October 1971, and a survey of black leaders in December 1971 confirming one made by Dennis Griffin in June 1971. Moreover, one week prior to the date specified for the filing of proposed findings, Bamford's counsel sought a reopening of the record to receive a further survey made by Bamford in October 1973. That re-

quest was denied by Order released December 4, 1973 (FCC 73M-1365).

22. The proposed findings filed herein by counsel made no effort to justify the survey methods utilized even though the cross-examination of Bamford by Bureau counsel clearly indicated the Bureau considered the methods deficient, and in the reply to the Broadcast Bureau's proposed findings, counsel largely attacks the Bureau's motivations and essentially contends that Bamford was a "confused witness" who did not fully comprehend the questions propounded on cross-examination. Opportunity was afforded at the hearing, however, for clarification of any matter which counsel deemed "confusing" to the witness, but was not utilized.

23. The Bureau, in its proposed findings, rejects the survey and the programming proposals as not in conformity with the *Primer* and urges the denial of the application. It does concede, however, that Bamford has adequately determined the needs and problems of Negroes in Corpus Christi.

24. The essential task, of course, is to determine whether there has been compliance with the *Primer* in the light of the total record made. The question is not whether Bamford has made the best possible survey, but whether it meets the minimum requirements of the *Primer*. There is not, as contended by the Bureau, an exact sequence and formula to be followed. The *Primer* does not require, as the Bureau seems to suggest, that the survey of community leaders and of the general public be wholly separate. The distinction between the two made in the *Primer* (Answers 11(a) and (b)) is the lesser requirement that consultation with the general public may be made by employees; here

Bamford made all survey contacts personally thus eliminating that distinction.

25. Summarizing the results of Bamford's consolidated efforts indicates contacts with special groups as follows:

- 12 females, including the president of the League of Women Voters, and past president of the American Association of University Women and Zonta International;
- 3 labor leaders, including business agents of two unions and the president of the Postal Clerks Union;
- 3 farmers or agriculturists;
- 4 blacks, including the president of the NAACP;
- 4 Spanish or Mexican-Americans, including the pastor of a Roman Catholic Mexican-American Church, a county clerk (elected) and a judge;
- 2 Jewish persons;
- 1 teacher;
- 12 civic officials, including the Mayor, City Manager, 3 City Councilmen, sheriff, police chief and a judge.

The remainder include persons of a wide spectrum of civic and business interests and organizations.

26. The Bureau's criticisms stress (1) so-called "unrepresented" groups, (2) inadequate coverage of females, and (3) inadequate coverage of Mexican-Americans. The only groups mentioned by the Bureau which are in fact unrepresented are those under 21 and students. With regard to the alleged inadequacies, it is apparently postulated that an

exact percentage distribution is required. But none is specified in the *Primer*. The female, labor, farmer, black and other groups are adequately, though minimally, represented.

27. The Bureau also contends Bamford's contacts with Mexican-Americans are inadequate. In view of their representing the largest minority group in the city — about 40% — this is an important factor. While Bamford answered in the affirmative when questioned as to whether there were any Mexican-American associations in the city, he also testified he tried but was unable to locate any. Moreover, the extensive list of service and other organizations of record fails to disclose any such organizations. Accordingly, Bamford's interviews were limited to the four Mexican-Americans previously noted. These were: the Rev. Aldape, Pastor of a Roman Catholic Mexican-American Church; Oscar Soliz, the County Clerk and president of the Knights of Columbus; Mrs. Garza, a Judge; and Thomas Gonzales, a City Councilman. While it is not clear why Bamford did not establish greater contacts in this portion of the community, especially in the light of his own Spanish-speaking and Latin American background, it is concluded that those listed are "leaders of the Mexican-American segment" within the meaning of the *Primer*. With regard to the omissions of youths and students as a subclass, the *Primer* sets forth no requirement in this regard, and those may be subsumed within the categories of white, black, Mexican-American and other groups.

28. A more difficult question is presented by Bamford's failure to have made any survey of other communities in the proposed "secondary" service area, namely, Sinton, Robstown and Portland,⁴ Texas. Here, Bamford's efforts

⁴ In his testimony Bamford referred to Robstown, Beeville and Sinton as the communities in his secondary area. In the mail survey, however, Portland was substituted for Beeville without explanation.

were limited to the postcard mailing of October 1971. Bamford mailed 75 to Sinton, 75 to Robstown, and 50 to Portland. There is no indication that any replies were received from those communities. Thus, there is a total failure of ascertainment of the area outside the proposed city of license and, hence, of programming to those needs. Bamford's only statement concerning these communities is that each has a radio station, Robstown and Sinton having both AM and FM stations.

29. With regard to the proposed programming in general, that described by Bamford is reasonably, but again minimally, geared to the community needs ascertained.

Conclusion

30. This simple uncontested proceeding has been characterized by unwarranted complexities resulting from the manner of its presentation. While Bamford, as a witness appeared most cooperative and desirous of complying with Commission requirements, the presentation on his behalf can best be described as "shoddy," aimed at achieving an absolute minimum of adherence to requirements (and, according to the Bureau, not even achieving that). By resolving all doubts in favor of Bamford, it is concluded that Bamford has achieved that minimum, except as to the requirement of the *Primer* that there be ascertainment in the secondary area, albeit on a reduced basis (Questions and Answers 6 and 7).

31. The *Primer* makes it clear that the omission of consultation with a "group" comprising the community is a defect which would, of itself, disqualify Bamford (Question and Answer 16) but it is not clear that failure to comply with the requirement of consultation in the second-

dary area is basic. If this were considered in a comparative context, this failure, and many others, would produce many minuses against Bamford. On the assumption that the public interest would be better served by making the assigned service available to the community of Corpus Christi, a matter that has been pending over four years, rather than rejecting it for the failure as to the secondary area, it is concluded that, notwithstanding, the application should be granted.

32. Accordingly, it is found that Bamford has ascertained the community needs and interests of the area to be served and adequately proposes to serve those interests.

IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the application of A.W. Bamford (File No. BPH-7006, Docket No. 19089) IS GRANTED.

/s/ FREDERICK W. DENNISTON

Frederick W. Denniston
Administrative Law Judge
Federal Communications
Commission

APPENDIX C
Before the App. 71
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. FCC 74R-374-31336

In re Application of :
A.W. Bamford : **Docket No. 19089**
Corpus Christi, Texas : **File No. BPH-7006**
For Construction Permit :

Appearances

Lauren A. Colby and Richard Tarrant, on behalf of A.V. Bamford; and *Charles W. Kelley, Philip V. Permut and Katherine S. McGovern*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

Adopted October 1, 1974; Released October 7, 1974.
By the Review Board: Pincock, Kessler and Emerson.

1. This proceeding involves the application of A.V. Bamford (Bamford) for authorization to construct a new FM broadcast facility at Corpus Christi, Texas. Administrative Law Judge Frederick W. Denniston released an Initial Decision¹ in which he concluded that the applicant had satisfied the requirements of the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971).² More specifically,

¹ FCC 74D-9, February 15, 1974.

² As a result of the dismissal of a competing applicant and the favorable resolution of financial and character qualifications issues against Bamford in a companion proceeding, the sole remaining issue for resolution in this proceeding is a *Suburban* issue.

the Presiding Judge found that Bamford had minimally complied with the *Primer* in all but one respect, ascertainment of the needs of his secondary service area. However, the Judge reasoned, since it is unclear the compliance with this requirement is basic to an applicant's showing, there is no impediment to grant of the application. Exceptions and a brief in support thereof were filed by the Broadcast Bureau.³ The Review Board has considered the Initial Decision in light of the exceptions and briefs, its examination of the record, and the arguments of the parties.⁴ We find the Administrative Law Judge's findings of fact to be substantially accurate, although incomplete. As a result, except as amplified and/or modified herein and in the rulings on exceptions contained in the attached Appendix, the Judge's findings of fact are adopted. However, based upon those findings, as supplemented or modified by this Decision, we cannot conclude that Bamford has made an adequate *Suburban* showing. In view of our disagreement with the Presiding Judge, a summary of the relevant facts will precede our evaluation of Bamford's efforts to ascertain community needs.

³ Bamford's limited exceptions are directed at the Presiding Judge's characterization of the nature of the representation provided by its counsel and, therefore, are not material to our resolution herein. We note, however, that we do not adopt the Judge's characterization of Bamford's showing, but prefer to let the facts speak for themselves.

⁴ Oral argument was held before a panel of the Review Board on September 24, 1974.

Facts

2. *Introduction.* Bamford made two distinct survey efforts in order to meet the specified issue.⁵ The first, conducted in May, 1971, resulted in contacts with forty-five persons in Corpus Christi; this survey was later supplemented with four contacts with black community leaders. Subsequently, in October, 1971, Bamford conducted two more surveys – one survey of twenty-two additional Corpus Christi community leaders, and a mail survey of the general public.⁶

⁵ At his request, Bamford was permitted to delay his survey efforts until after the *Primer* was released on February 23, 1971.

⁶ Bamford's request to reopen the record to receive an amendment containing a 1973 survey of community needs one week prior to the date established for the submission of proposed findings and conclusions was denied by the Presiding Judge by Order, FCC 73M-1365, released December 4, 1973, reconsideration denied FCC 73M-1411, released December 14, 1973. Although Bamford alleges in its reply pleading that the Judge erred in refusing to accept this amendment, it did not address any exceptions to the ruling. We have nevertheless reviewed the Judge's ruling with which we are in full agreement. In any event, the contents of the proffered amendment would not serve to cure all of the defects in Bamford's showing. For example, the applicant did not conduct a further survey of the general public in accordance with *Primer* requirements as to methodology. As an additional matter, we note that the Bureau has filed a motion to strike allegations advanced for the first time in Bamford's reply. We will grant the Bureau's motion to the extent that the reply contains new matter and/or arguments which properly should have been the subject of exceptions or an appropriate appeal from the Judge's rulings.

3. *May, 1971, Survey Efforts.* The applicant's showing as to the composition of its proposed city of license is confined to one page of 1970 census data, which categorizes the Corpus Christi SMSA population according to race,⁷ age and status as head of household. However, when questioned during hearing about population characteristics such as educational attainment and economic levels, Bamford admitted that in assessing the composition of the city, he had looked solely at racial designations. In spite of this testimony, there is no indication that even this meagre breakdown of population characteristics was used as a reference in determining the individuals who were to be interviewed as community leaders.⁸ This lack of correlation is evident upon examination of the forty-five interviews which Bamford conducted; thus, of the twenty-two contacts which the applicant identified as being with community leaders, only three Spanish-Americans were consulted, and no representatives of either the black or female communities were consulted. As a means of remedying one apparent deficiency in this regard, the general manager

⁷ Since the Bureau of Census classifies Americans with Spanish surnames as white, Bamford's demographic showing did not reveal the high percentage of Corpus Christi population which is Spanish-American. After hazarding a guess as to the probable percentage during hearing, Bamford later testified that the Corpus Christi Chamber of Commerce had informed him that the percentage of Spanish-Americans in the city is 35.7%.

⁸ Rather, as noted by the Broadcast Bureau in its proposed findings, Bamford clearly avoided addressing the question of whether or not he had determined what groups and organizations were significant in the area in light of a determination of the composition of Corpus Christi. (Tr. 123).

of Bamford's San Antonio station, Dennis Griffin, subsequently interviewed four leaders of the black community.⁹

4. Of the forty-five persons initially interviewed by Bamford, twenty-two were classified as community leaders and the balance as members of the general public. Aside from a stated preconceived notion as to what kinds of people should be regarded as important to the community,¹⁰ Bamford's explanations of why he designated certain interviewees as community leaders are vague and uncertain. For example, when questioned about including a Mr. Liedecker in his list of community leaders, Bamford responded as follows: "He belongs to the Jewish Minority and therefore I thought it was important to contact Jewish people, too. He is a very pleasant and wonderful person and therefore he represents the community. He belongs to Temple Beth El and the Corpus Christi County Club."¹¹

⁹ During the hearing, Bamford offered testimony and Exhibit 7 which included information concerning his interviews with four members of the black community previously interviewed by Griffin. In his Initial Decision, the Judge accepted this Exhibit, including a previously stricken portion containing four additional interviews.

¹⁰ "... community leaders, judges, district attorneys, business leaders, tourism leaders, Chamber of Commerce leaders" (Tr. 123). This view appears to have been determinative in choosing interviewees; thus, Bamford's efforts were concentrated in consulting the following categories of representatives: tourism, business, farming, government, union, religion, and civic organizations.

¹¹ This response is not atypical. As related by the Bureau in its proposed findings, Bamford gave the following explanations for his classifications: Terry Ferrell was included as a leader because "... he is in constant contact with the needs of the community" through the ad agency he runs; Charles Randall was designated as a leader because of his association with Buccaneer Days at the Coliseum;

(continued)

Moreover, it is not clear that those persons chosen to be representative of community groups are, in actuality, representative. For example, when questioned about Liedecker's role in the Jewish community, Bamford was unable to state that Liedecker was a leader in that community. More important, none of the three Spanish-Americans interviewed by Bamford were shown to be leaders of that significant population grouping. With respect to Bamford's general public survey, it should first be noted that there is no description of what type of "random" method, if any, was used in selecting the interviewees. Moreover, assuming that a random method was used, there is no explanation as to why in light of the population characteristics¹² of Corpus Christi, such a random selection (a) failed to include any Spanish-Americans or blacks, and (b) included only three women.

5. As a result of his survey efforts, Bamford ascertained a substantial number of community needs and problems, four of which were considered to be of primary importance.¹³

¹¹ (continued) Alan Webb was included because he is attempting to improve the status of the farming community; and Joe Luciano was included because he has been associated with the Restaurant Association which works to increase tourism; etc.

¹² The demographic data submitted by Bamford reveals the following: The Corpus Christi SMSA contains 284,832 persons, of whom 94.7% are white, 4.3% are black and 1% are other. The population is 51% female, 52% are 24 years of age or younger, and 10% are 60 years of age or older. Additionally, as previously stated, Bamford testified that 35.7% of the population is Spanish-American.

¹³ The needs for a convention center and a government complex (including a new courthouse), tourism, and the adoption of liquor by the drink legislation.

In order to meet these needs, the applicant proposed two programs (in addition to public service announcements), a fifteen minute, five night a week public affairs program entitled "Corpus Christi Speaks", and a weekly fifteen minute panel discussion.

6. *October 1971, Survey Efforts.* In connection with these efforts, Bamford submitted additional demographic data. The material includes lists of Corpus Christi service, professional and trade organizations, as well as data about the industrial life of the city and a rough description of the nature of the work force. Bamford interviewed twenty-two additional community leaders, including various city officials and representatives of business, charitable and civic organizations, such as the League of Women Voters; American Association of University Women, the Boys Club, Catholic Youth Center and Goodwill Industries. The applicant's new survey of the general public was conducted by mailing approximately 500 double postcards, the bulk of which were sent to Corpus Christi residents and the remainder to residents of three other towns. Approximately 50 responses were received. In light of the responses to these survey efforts, Bamford proposes, in addition to his initial program proposal, to broadcast two specials on area restoration problems, a five-minute daily broadcast about the availability of housing and a five-minute weekly program concerning Corpus Christi's police department.

Evaluation

7. Although Bamford purports to have relied upon the *Primer*, it is clear that the applicant failed to satisfy its requirements in several major respects. The initial defects in Bamford's showing stem from his failure to distinguish between the community leader and general public aspects

of the *Suburban* requirement. Briefly stated, in planning its community leader survey, an applicant must make a determination of the demographic composition of its community of license in order to ascertain the groups which comprise the community, and then use that information to select the community leaders to be consulted.¹⁴ In contrast, in requiring that a random sample of members of the general public be consulted, the Commission seeks to assure that a supplementary survey of interviewees, who are roughly representative of the population as a whole, will be contacted. In the Board's view, Bamford's showing is defective with respect to both of the requisite kinds of survey efforts.

8. *Community Leader Surveys.* As an initial matter, there is no indication that Bamford complied a study of the composition of Corpus Christi before commencing his ascertainment efforts. Rather, given the lack of correlation between the applicant's May, 1971, survey and the rather crude 1970 census data he submitted, the contrary is indicated. The shortcomings in the applicant's demographic material constitute a significant deficiency in its *Suburban* showing. See *Media, Inc.*, 41 FCC 2d 30, 27 RR 2d 1077 (1973), pet. for rev. den. FCC 74-767, released July 16, 1974. Moreover, even assuming that Bamford's demographic study were a sufficiently precise reflection of its community,¹⁵ it is our view that the applicant failed to survey leaders of significant population groupings. Thus, it is of critical significance that none of the four Spanish-Americans interviewed by the applicant were shown to be leaders of this

¹⁴ See Q's and A's 10 and 13(a) of the *Primer*. Cf. Q's and A's 13(b) with respect to the random sample of the general public.

¹⁵ But see footnote 17, *infra*.

community (or even necessarily representative thereof).¹⁶ This deficiency, standing alone, is sufficient basis for denying Bamford's application. See *Voice of Dixie, Inc.*, 45 FCC 2d 1027, 29 RR 2d 1127 (1974), recon. den., 47 FCC 2d 526, 30 RR 2d 851 (1974). Moreover, Bamford failed to consult with at least one other significant community group. According to the 1970 Census (General Social and Economic Characteristics), 18.4% of the families in the Corpus Christi SMSA are below the poverty level.¹⁷ Yet, when questioned about welfare organizations in the community, Bamford testified that he had been unable to locate any representatives of such organizations. Finally, as a general observation, we note that Bamford's understanding of the nature of a community "leader" (see paragraph 4, *supra*) is somewhat uncertain and vague and, as a result,

¹⁶ In this connection, it is noteworthy that even though 35.7% of the Corpus Christi population is Spanish-American, Bamford was unable to locate leaders of representative organizations. The Commission has specifically addressed itself to this difficulty, stating, since "... an applicant may not arbitrarily avoid personal consultations with significant groups because the group lacks a highly developed formal structure, we believe that it is appropriate to [advise] ... that additional efforts may be needed to identify leaders of less organized groups." 27 FCC 2d 650, 666, 21 RR 2d 1507. We also note that the fact that Bamford is Spanish speaking is no substitute for contacting leaders representing this group, particularly since Bamford is not a resident of Corpus Christi.

¹⁷ The Board will take official notice of this Census figure. In our view, Bamford's failure to adduce this obviously significant fact about its proposed community of license serves to further detract from the thoroughness and, therefore, the overall accuracy and objectivity of its demographic showing.

does not accord reasonable assurance that these persons are community leaders. One further matter remains to be discussed. In our view Bamford's failure to survey community leaders in his proposed secondary service area, the only deficiency noted by the Presiding Judge, is not disqualifying. The *Primer* provides that an applicant is required to survey the needs of major communities within that area, absent a showing why such communities need not be served (Q and A 6). The only record evidence in this regard is Bamford's statement that he chose not to serve three particular communities (Sinton, Robstown and Beeville, Tr. 122) because they already had local transmission services. Even assuming that any or all of the three communities can be considered "major", Bamford's explanation for not serving them was not challenged, and it is, accordingly, deemed an acceptable one. See paragraph 24 of the *Primer*. Cf. *Voice of Dixie, Inc.*, *supra*.

9. *General Public Surveys.* Bamford's designation of some of his original interviewees as community leaders served to classify the remaining persons as members of the general public by default. There is no showing, therefore, that these interviewees were selected so as to comply with the "random sample" requirements of the *Primer* (Q and A 13(b)). See *Media, Inc.*, *supra*. Furthermore, even though statistical accuracy is not required, the effect of Bamford's failure to insure a random sample is illustrated by the fact that the general public survey does not even roughly reflect the community's composition.¹⁸ As a consequence, Bamford's somewhat haphazard approach left

¹⁸ In this regard, the Commission stated that "Since consultations with members of the general public will be a roughly random sample, that sample will generally reflect the community's composition, although, as previously noted, statistical accuracy is not required." 27 FCC 2d 650, 667, 21 RR 2d 1507.

several major groups either unrepresented or underrepresented; as noted by the Bureau, no blue collar workers, Spanish-Americans,¹⁹ students, housewives, farmers, teachers or people under 21 years of age, were found among those surveyed as members of the general public, and of the 23 interviews which may be presumed to compose the general public survey, only three were women.²⁰ Finally, Bamford's attempt to supplement his general public survey by mailing questionnaires must be disallowed. The Commission has been explicit in proscribing reliance on a survey where the method of collection of responses from members of the general public requires the interviewee's voluntary return of the questionnaire by mail. See paragraph 46 of the Report adopting the *Primer*. The "cooperation bias" which the Commission views as an attendant danger in this method of surveying is dramatically illustrated here; thus of the 500 questionnaires distributed, only 50 were returned and those were of uncertain origin. Finally, in light of Bamford's failure to adequately ascertain the needs and interests of the community to be served, an evaluation of the means by which he proposes to meet those needs and interests would serve no useful purpose.

11. ACCORDINGLY, IT IS ORDERED, That the Broadcast Bureau's motion to strike the reply of A.V. Bamford to Broadcast Bureau's exceptions, IS GRANTED to the extent indicated herein; and

¹⁹ The four Spanish-Americans erroneously interviewed as community leaders could be considered members of the general public, however.

²⁰ See footnote 12, *supra*.

12. IT IS FURTHER ORDERED, That the application of A.V. Bamford (BPH-7006) for a construction permit for a new FM broadcast station at Corpus Christi, Texas, IS DENIED.

/s/ SYLVIA D. KESSLER
 Sylvia D. Kessler
 Member, Review Board
 Federal Communications
 Commission

Attachment

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1309

September Term, 1975

A.V. Bamford,
Appellants

v.

[Filed May 6, 1976]

Federal Communications Commission,
AppelleeBefore: Baselon, Chief Judge; Wright, McGowan, Tamm,
Leventhal, Robinson, MacKinnon, Robb and
Wilkey, Circuit Judges.

ORDER

Appellant's suggestion for rehearing *en banc* having been transmitted to the full Court and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED, by the Court *en banc* that the aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

For the Court:

/s/ George A. Fisher

Clerk

Circuit Judges Tamm and MacKinnon would grant appellant's suggestion for rehearing *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1309

September Term, 1975

A.V. Bamford,
Appellant

v.

Federal Communications Commission,
Appellee

Before: Danaher, Senior Circuit Judge; Leventhal, Circuit Judge and Van Pelt*, Senior District Judge for the District of Nebraska

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

/s/ George A. Fisher

Clerk

*Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

Senior District Judge Van Pelt would grant appellant's petition for rehearing.

No. 76-8

U.S. SUP. CT.
FILED

SEP 28 1976

In the Supreme Court of the United States

OCTOBER TERM, 1976

A. V. BAMFORD, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS
COMMISSION IN OPPOSITION

ROBERT H. BORK,
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DONALD I. BAKER,
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Washington, D.C. 20554.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-8

A. V. BAMFORD, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE FEDERAL COMMUNICATIONS
COMMISSION IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 535 F. 2d 78. The order of the Federal Communications Commission is unreported. The memorandum opinion and order of the Commission's Review Board (Pet. App. C) is reported at 48 FCC 2d 1155. The initial decision of the administrative law judge (Pet. App. B) is reported at 48 FCC 2d 1161.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1976, and a timely petition for rehearing with suggestion for rehearing *en banc* was denied on May 6, 1976 (Pet. App. D). The petition for a writ of

certiorari was filed on July 7, 1976. The jurisdiction of this Court is invoked under 47 U.S.C. 402(j) and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner received fair notice of the community groups he was required to consult in order to make a sufficient ascertainment of the community's programming needs to obtain a broadcast construction permit from the Federal Communications Commission.

2. Whether the Commission erred in refusing to allow petitioner to reopen the record for a third time to supplement his survey of the community's needs.

STATEMENT

The Federal Communications Commission (the "Commission") requires an applicant for new broadcasting authority to familiarize itself with the needs, interests and problems of the groups comprising the community proposed to be served by the new facility; to document its familiarity with those concerns in the license application; and to submit programming proposals designed to meet those needs. As set forth in its Report and Order entitled *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (the "Primer"), the Commission requires each applicant to consult (1) a randomly selected sample of members of the general public (*id.* at 660, 666-667, 682); and (2) leaders of each "significant group" comprising the community (*id.* at 660, 666, 668, 682-684). In recognition of the heterogeneous nature of the nation's communities, the Commission did not promulgate an exhaustive list of organizations that are considered "significant" for purposes of ascertaining

the relevant leaders to be consulted.¹ Rather, it required that each applicant make a demographic and economic study of the community to be served to determine its distinctive features and then select for consultation community leaders of formal and informal groups that reflect its particular composition (*id.* at 663, 666, 683-684). The Commission cautioned, however, that "[t]he omission of consultations with leaders of a significant group would make the applicant's showing defective, since those consulted would not reflect the composition of the community" (*id.* at 684, emphasis supplied; see *id.* at 666).

In January 1970, petitioner applied to the Commission for a construction permit for a new FM radio station in Corpus Christi, Texas.² In May 1971, petitioner conducted a series of personal interviews with 45 residents of that city. He designated 22 of these persons as community leaders, and the remaining 23 people were considered to be "de facto" members of

¹The Primer provides that "[t]he 'significance' of a group may rest on several criteria, including its size, its influence, or its lack of influence in the community." 27 FCC 2d at 683.

²Petitioner submitted his application shortly after the Commission issued a notice of inquiry on the ascertainment standards and published a proposed Primer (20 FCC 2d 880). At petitioner's request, a hearing on his application was delayed pending publication of the Primer. After its publication, applicants with pending proceedings were allowed to amend their community ascertainment showings as a matter of right to comport with the Primer's standards (27 FCC 2d 680). Pet. App. 4a-5a.

the general public (Pet. App. 5a & n. 6, 24a).³ After an initial hearing on the ascertainment issue raised questions about petitioner's failure to consult leaders of significant groups, he interviewed an additional 22 community leaders (Pet. App. 5a, 28a-30a). He also submitted to the Commission a study of the composition of the community consisting of one page from the 1970 Census, providing information on race, age and head of household status for the population, and a list of the community's service, professional and trade organizations, as well as a general description of its industrial activity and work force (Pet. App. 7a-8a). His compositional study contained no information on income distribution, which would have shown that 18.4 percent of the population was below the poverty level (Pet. App. 8a, 46a).

The Commission's record on petitioner's license application was closed on January 20, 1972. On September 18, 1973, the Commission's Administrative Law Judge set November 19, 1973, as the date for filing proposed findings of fact. One week before that deadline, petitioner requested a postponement of the filing date and a reopening of the record to allow submission of a new community needs ascertainment study designed to cure "potentially disqualifying" inadequacies in his original submission (Pet. App. 17a-18a, 40a, n. 6). The Administrative Law Judge denied that motion on the ground that petitioner had failed to show good cause for the reopening, as required by Section 1.552(b) of the Commission's rules, 47 C.F.R. 1.522(b) (Pet. App. 17a).

³Petitioner also mailed questionnaires to 500 members of the general public. However, the Primer expressly provides that applicants cannot rely on information gathered by the recipients' voluntary return of such questionnaires by mail because of the strong "cooperation bias" this survey technique produces (27 FCC 2d at 668, 684; Pet. App. 48a).

Although characterizing petitioner's showing as "fragmented," "haphazard in the extreme," and designed to achieve "an absolute minimum of adherence" to the ascertainment requirements (Pet. App. 32a, 36a), the Administrative Law Judge nonetheless found that petitioner had complied with the Primer (*id.* at 36a-37a). The Commission's Review Board reversed his initial decision and denied petitioner's application. It held that both petitioner's general public and community leader surveys were deficient. It found that his failure to conduct adequate community leader consultations was due to the insufficiency of his efforts to determine the demographic composition of the community and thus identify the relevant categories of leaders to be targeted. The Board specifically noted that although 18.4 percent of the families in the area were below the poverty level, petitioner had not contacted representatives of any community welfare organizations (Pet. App. 46a). Moreover, the Board held that petitioner's method of designating 23 of his original interviewees as members of the general public by default did not constitute a random survey of the general public, as the Primer requires. It found that as a consequence of this defect, petitioner's public survey did not "even roughly reflect the community's composition," for only 13 percent of those interviewed were women, and no blue-collar workers, students, housewives, farmers, teachers, persons under 21 years of age, or members of the large Spanish-surnamed minority population were consulted in that study (Pet. App. 47a-48a). The Commission denied review on the basis of the Review Board's opinion (Pet. App. 2a, n. 1).

The court of appeals, with one judge dissenting, affirmed the Commission's decision (Pet. App. A). It concluded that petitioner's failure to interview any community

leader representing the interests of the substantial number of impoverished persons in the Corpus Christi area necessarily rendered his ascertainment study defective and justified the denial of his application (Pet. App. 11a, 16a).⁴ It also found that the Primer, the Report accompanying the Primer, and prior Commission precedent had provided petitioner adequate notice that he was required to consult with the leaders of the poor (Pet. App. 13a-16). Finally, it held that the Administrative Law Judge had not erred in rejecting petitioner's request to reopen the record for submission of new material designed "merely * * * to overcome the blatant deficiencies of the previous ascertainment efforts" (Pet. App. 18a).⁵

ARGUMENT

This case involves merely the application of the Commission's recently promulgated regulations in the particular factual context of a single license application and therefore presents no issue of general significance warranting review. In any event, the decision of the court of appeals was correct.

⁴The Commission had also concluded that petitioner's ascertainment survey was defective for failure to show consultation with leaders of the Spanish-speaking community (Pet. App. 45a-46a). However, the court of appeals held that petitioner's survey efforts had been adequate in this respect (Pet. App. 9a-11a). Therefore, contrary to petitioner's assertion (Pet. 6, 14), that issue is not before this Court.

⁵The court of appeals also affirmed the Commission's finding that petitioner's general public survey was not conducted in compliance with the Primer because the persons selected for interviewing had not been randomly selected (Pet. App. 6a-7a, n. 7). Although this finding, as affirmed, constituted an independent basis for the rejection of petitioner's application, the court of appeals did not rely upon this ground in affirming the Commission's decision.

1. Petitioner contends (Pet. 10-12, 13-14) that the ascertainment standards set forth in the Primer are so vague that they did not provide adequate notice that he was required to consult representatives of the impoverished in order to obtain a construction license. Contrary to his representation (Pet. 6, 14-15), however, the Primer did not establish an exhaustive list of categories of community leaders applicants were required to interview (Pet. App. 11a-12a, n. 12). The Commission's Report accompanying the Primer explicitly stated that submission of a separate compositional study of the community was required because "no community can be described as 'average' " and thus no single listing of community groups could be representative of every locality in the country (27 FCC 2d at 662). The Report further specified that an applicant would be required to communicate with leaders of "welfare associations" if they comprised a significant segment of the community to be served, and that its programming then might include treatment of the problems of the impoverished (*id.* at 657, 663, 671, 672-673).⁶ Moreover, as the court of appeals noted (Pet. App. 13a-16a), prior Commission decisions clearly indicated the poor must be consulted if they constitute a significant population element. See, e.g., *City of Camden*, 18 FCC 2d 412.

Petitioner also suggests that the Commission's denial of 16 license applications for failure to conduct adequate community needs surveys demonstrates that the Primer's standards are unclear. However, since hundreds of other applicants have satisfied those requirements during this period, the explanation for petitioner's failure

⁶As the court of appeals correctly held (Pet. App. 13a, n. 13), the Report and Order of the Commission were an integral part of the Primer.

of compliance must lie in the "haphazard ascertainment showing" and insufficient demographic study he presented (Pet. App. 7a) and not in the flexibility the regulations provide to accommodate the diversity of the nation's communities.

Petitioner also contends (Pet. 8-10) that the decision of the Commission's Review Board to issue a construction license is an unrelated proceeding, *In re Application of A. C. Elliott, Jr.*, Docket No. 20196, demonstrates that the Commission has applied its ascertainment standards in an inconsistent manner. However, the administrative proceedings in the *Elliott* case are not yet final; the Commission is currently considering an appeal by its Broadcast Bureau from the Review Board's decision. In any event, the resolution of a conflict, if any, in the Review Board's application of these standards to the discrete factual situations presented by various license applications is properly a matter for the Commission and not this Court.⁷

2. Moreover, even though the court of appeals did not rely on this rationale, petitioner's failure to comply with the Primer's general public survey requirements provides an independent basis for upholding the decision below. The court of appeals specifically affirmed the Commission's finding that petitioner's interviews with 23 persons not selected at random were inadequate (Pet. App. 6a-7a, n. 7). Since a proper random survey is one of the coordinate bases upon which the applicant's

⁷Similarly, petitioner's suggestion (Pet. 13) that a conflict may develop in the future among the decisions of the various panels of the court of appeals concerning factual application of the ascertainment standards provides no occasion for granting the petition. Even were a true intra-circuit conflict to develop, it should properly be resolved by the court of appeals sitting *en banc*.

evaluation of community needs depends (27 FCC 2d at 682), petitioner's failure to conduct an adequate survey in itself warranted denial of his application.⁸

3. Petitioner also contends (Pet. 14-15) that the court of appeals erred in holding that the Commission properly refused to reopen the record in November 1973 to allow submission of additional survey material. Section 1.522(b) of the Commission's regulations provides that an application may be amended after it has been designated for hearing "only for good cause shown".⁹ Petitioner's proposed submission was designed merely to overcome the "potentially disqualifying" deficiencies in his prior ascertainment efforts, and not to update his old surveys to present a current assessment of the community's needs. Petitioner has shown no justification for the inadequacy of his earlier efforts and suggested no reason why any supplemental showings he wished considered could not have been submitted at a much earlier date. The court of appeals thoroughly considered whether petitioner had in fact shown good cause for this eleventh

⁸The Commission has determined that different standards are appropriate to judge the showing of community needs by applicants for renewal of broadcasting authority, who bear a continuous ascertainment obligation. See *Ascertainment of Community Problems by Broadcast Applicants*, 57 FCC 2d 418; cf. 41 Fed. Reg. 19536. Thus, even if, as petitioner suggests (Pet. 13-14), the Commission has promulgated an exhaustive list, not including welfare organizations, of community groups to be consulted by renewal applicants, see 41 Fed. Reg. 19553, petitioner is not thereby entitled to relief for his failure to comply with the differing standards reasonably applied to applicants for initial authority.

⁹Section 1.522(b), 47 C.F.R. 1.522(b), provides, in pertinent part:

Requests to amend an application after it has been designated for hearing will be considered only upon written petition * * * and will be granted only for good cause shown.

hour submission and concluded that he had not (Pet. App. 16a-19a). Further review of this factual issue is not warranted—especially in light of the fact that petitioner will be free to submit a new application for the construction permit after final disposition of this case.¹⁰

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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¹⁰Under Section 1.519 of the Commission's regulations, 47 C.F.R. 1.519, the same applicant may reapply after 12 months has elapsed from the Commission's denial of his prior application (although the Commission will not consider the new application until final disposition of any appeal that has been taken from the prior application). There is, of course, the possibility that competing applications may be filed in connection with a renewed application by petitioner (see 47 C.F.R. 1.571(c)), even though no competing applications were involved in his filing at issue here.